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No. 04-_____

In The
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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Questions Presented

1. Whether as-applied challenges are permitted to the prohibition on corporate disbursements for electioneering communications at 2 U.S.C. § 441b after *McConnell v. FEC*, 540 U.S. 93 (2003).

2. If so, whether the prohibition on electioneering communications is unconstitutional as applied to the facts of this case, and particularly

(a) the three particular grass-roots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. here and/or

(b) grass-roots lobbying communications generally, as carefully defined,

with any communications to be funded either from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E). App. at 19a.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

Wisconsin Right to Life, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

Notice of Statutory Expedition & Advancement on the Docket

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), 116 Stat. at 114, App. at 23a.

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Introduction

May a court in a facial challenge prohibit *all* future as-applied challenges to a statute? May it do so for all time, all parties, all fact situations, and all constitutional claims (even those based on rights not raised in the first case)? And did this Court actually do so in *McConnell v. FEC*, 540 U.S. 93 (2003)?

In *McConnell*, this Court upheld against a facial challenge § 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), entitled "prohibition of corporate and labor union disbursements for electioneering communications" ("the prohibition"). 540 U.S. at 203-09. The prohibition bans corporations from using general corporate treasury funds for targeted broadcast communications that reference a federal candidate for thirty days before a primary election and sixty days before a general election. *See* App. at 18a-21a, 24a-32a. Wisconsin Right to Life, Inc. ("WRTL") was not a party in *McConnell*.

After *McConnell*, but before the 2004 primary and general elections in Wisconsin, WRTL challenged the prohibition as applied to either (a) three particular grass-roots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. and/or (b) grass-roots lobbying communications generally, with the communications to be funded either from a general corporate account or from a separate bank account to which only individuals may contribute. WRTL does *not* challenge the electioneering communication disclaimer and disclosure provisions and will comply with them, so that there is no issue as to hidden identity or activity.

The district court dismissed the case with prejudice, not because *McConnell* precludes *this* challenge, but because *McConnell* supposedly precludes *all* future as-applied challenges to the prohibition. App. at 2a. And the district court dismissed the case on that ground without ruling on completely briefed and fully dispositive cross-motions for summary judgment (denying them as moot). App. at 1a.

Foreclosing the possibility of all future as-applied challenges is unprecedented, and neither the district court nor the Federal Election Commission ("FEC") has cited any holding that such blanket claim preclusion is even possible. It defies reason, reality, and justice to assume that a court could foresee all future factual variants by all possible claimants and decide against them in advance. It also defies Article III and the adjudicatory principles of this Court, which both forbid courts to decide cases not before them and give advisory opinions as to any or all future claims.

What if the FEC had said "no," instead of "yes," in Advisory Opinion 2004-31, when asked if candidate Russ Darrow's name could be used in broadcast ads (that would otherwise qualify as electioneering communications) by the automobile dealerships bearing his name, but no longer under his day-to-day management? Would an as-applied claim by the dealerships have to be dismissed because *McConnell* precluded all as-applied challenges?

What if a candidate is a party to a class-action suit and notices need to be broadcast to reach class members during the prohibition period? Would the due process rights of class members be entitled to no consideration in an as-applied challenge to the prohibition?

What if a federal candidate is a party to a bankruptcy and notices need to be broadcast to creditors? Will creditors rights be ignored because *McConnell* doesn't allow any future as-applied challenges?

What if a products liability lawyer hears that some new drug has just been pulled off the market by the FDA and he wants to broadcast ads to attract class action clients against the drug company involved, but he happens to be a candidate and the FEC tells him his situation isn't like Russ Darrow's? Is he not entitled to his day in court?

WRTL's claim was dismissed with prejudice, so it is forever barred from making any future as-applied claim against the electioneering communication prohibition. And

since the district court is the only court that may hear claims against BCRA until January 1, 2007, BCRA § 403(d), App. at 22a, everyone else in America is similarly barred until then. There will be no circuit splits soon, if ever.

WRTL asks this Court to note probable jurisdiction, reverse the district court, and decide the case on the merits, which is appropriate because (a) both parties moved for fully dispositive summary judgment (denied as moot), (b) Congress specified expedited consideration of challenges to BCRA,[1] and (c) the 2006 elections rapidly approach. Alternatively, WRTL asks this Court to summarily reverse the district court's dismissal and remand this case with instructions to expeditiously decide on the merits the already briefed cross-motions for summary judgment.

Opinions Below

The unreported district court *Order* and *Memorandum and Order* dismissing this case with prejudice are at 1a and 2a (Appendix). The unpublished opinion denying preliminary injunction is included at 4a because the memorandum dismissing the case said that the court did so "for the reasons set forth in its prior opinion." App. at 2a-3a. Case documents are available at http://www.dcd.uscourts.gov/ with PACER.

Jurisdiction

The *Order* and *Memorandum and Order* dismissing this case were dated May 9, and filed May 10, 2005. WRTL's *Notice of Appeal of Dismissal to U.S. Supreme Court* was filed and served on May 12, 2005. App. at 33a. Appeal is taken pursuant to 28 U.S.C. § 1253 (direct appeal to the Supreme Court from decisions of three-judge courts denying a permanent injunction) and BCRA § 403(a)(3) (direct appeal to the Supreme Court of the district court's "final decision"). App. at 23a.

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[1]Congress required expedition and advancement on the docket in the district court and in this Court "to the greatest extent possible." BCRA § 403(a)(4), App. at 23a.

Constitutional, Statutory & Regulatory Provisions

The First Amendment to the Constitution is at 18a.
2 U.S.C. § 434(f)(1)-(3) (definition) is at 18a.
2 U.S.C. § 441b(a)-(b)(2) (prohibition) is at 21a.
BCRA § 403 (jurisdictional statute) is at 23a.
11 C.F.R. § 100.29 (definition) is at 24a.
11 C.F.R. § 114.2(a)-(b) (prohibition) is at 29a.
11 C.F.R. § 114.14 (prohibition) is at 31a.

Statement of the Case

During the summer of 2004, the filibustering of nominees to the federal bench reached its peak and WRTL launched a grass-roots lobbying campaign to encourage its two United States Senators to oppose filibusters in upcoming votes. But WRTL had to file suit seeking declaratory and injunctive relief to allow it to fund (1) the three broadcast of advertisements at Exhibits A-C, App. 13a-17a, and (2) similar grass-roots lobbying ads, because Sen. Feingold was a candidate in the September 14, 2004, primary and the November 2, 2004, general elections and the ads became prohibited electioneering communications. *See* App. at 18a-21a (definition). So WRTL was prohibited from paying for the ads with general corporate funds from August 15 to November 2. *See* App. at 21a-23a (prohibition).

On July 28, WRTL filed its verified complaint and sought a preliminary injunction to permit continued running of its grass-roots lobbying ads. A three-judge court was convened pursuant to BCRA § 403(a)(1). App. at 23a. WRTL's preliminary injunction motion was denied August 12th, with a *Memorandum Opinion and Order* issued August 17th. App. at 4a.

In its complaint and other filings, WRTL noted that the ongoing filibuster issue seemed to be coming to a head before the election, which was why it desired to broadcast the ads at that time. It had been reported that on July 23, 2004, the number of federal judicial nominees whose confirmation votes were being filibustered reached double

digits. *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05. Further, the Senate leadership intended to bring up for vote additional judicial nominees throughout the fall and "by year's end Democrats could have to filibuster as many [as] 16 nominees for the entire 108th Congress." Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.

WRTL began broadcasting the advertisement at Exhibit A on July 26 and broadcast B and C shortly thereafter. *See* App. at 13a-17a. WRTL intended to continue running the ads throughout the late summer and fall to influence the votes of Senators Kohl and Feingold on the current and expected filibusters. The ads became electioneering communications on August 15, so WRTL ceased running them.

WRTL is a nonprofit, nonstock, ideological Wisconsin corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. WRTL does not qualify for any exception permitting it to pay for its broadcast ads from corporate funds.

There are several factors that indicate that the broadcast ads are authentic grass-roots lobbying and not electioneering: (1) they concern only a legislative matter; (2) the only reference to a clearly-identified federal candidate is a statement urging the public to contact the candidate and ask that he take a particular position on the legislative matter; (3) the ads contain no reference to any political party; (4) they contain no reference to the candidate's record or position on any issue; (5) they contain no reference to the candidate's character, qualifications or fitness for office; (6) they contain no reference to the candidate's election or candidacy; (7) they focus only on particular or specific, pending legislative action as opposed to a general issue; (8) they contain no words that promote, support, attack, or oppose a candidate; (9) they contain information for the person whom the communication urges the audience to contact (by reference to a website); (10) the federal candidate referenced is an incumbent; (11) the ads identify two

incumbent Senators; (12) they refer to a candidate and non-candidate and deal with them equally; (13) they deal with currently ongoing legislative action that was reported to be coming to a head during the prohibition period and the timing of the legislative action was beyond the control of the communicator; (14) they dealt with an issue in which the communicator had a clear and long-held interest; (15) they were run outside the prohibition periods as well as within them (had injunctive relief permitted); (16) they could have been run only with money from a "segregated bank account" under 2 U.S.C. § 434(f)(2)(E) (only donations from qualified individuals) if necessary to obtain injunctive relief. Moreover, WRTL does *not* challenge the disclaimer and disclosure requirements, so there would be full transparency.

Broadcast advertisements are the most effective form of communication for a grass-roots lobbying campaign, and non-broadcast communications would not have provided WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message.

Using funds from WRTL's federal political committee fund ("WRTL-PAC") was an inadequate option. As of August 6, 2004, WRTL had $13,766.90 in its WRTL-PAC account. This money is the only money that WRTL could use for federal contributions and independent expenditures. 2 U.S.C. § 431(8) and (17) (definitions). If WRTL-PAC funds had been used for the grass-roots lobbying ads, those funds would not have been available for the contributions and independent expenditures that WRTL intended to make.

The approximately $14,000 in funds in the WRTL-PAC account in early August of 2004 would not have been sufficient for the planned advertising expenditures, even if WRTL has not planned to use the $14,000 for its federal independent expenditures and contributions. The total projected cost of WRTL's grass-roots lobbying campaign was $100,000. However, PAC money is difficult to raise, because it is subject to the source, amount, and disclosure requirements of the Federal Election Campaign Act ("FECA"), and

WRTL believed that it could not raise sufficient funds in its PAC to fund the grass-roots lobbying campaign.

While the 2004 election is past, this case is not moot because WRTL intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period. Amended Verified Complaint for Declaratory and Injunctive Relief ¶ 16.[2] Further, election cases are classic examples of the exception to the mootness doctrine for cases that are capable of repetition yet evading review.[3]

The Questions Presented Are Substantial

This case presents two substantial questions: (1) may all future as-applied challenges be foreclosed by one opinion and did this Court even purport to do so with respect to electioneering communications in *McConnell v. FEC*, 540 U.S. 93, and (2) is an exception to the electioneering communications prohibition constitutionally required for genuine grass-roots lobbying?

The first question is immediately before this Court

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[2] In addition to ongoing judicial filibusters, WRTL has an interest in grass-roots lobbying as to a broad range of currently hot social issues that the legislative and executive branch often deal with in periods before elections, including embryonic stem cell research, cloning, abortion (including partial-birth abortion), fetal pain legislation, Medicare policy, foreign aid policy, nutrition/hydration withdrawal, health-care rationing, assisted suicide, euthanasia, non-discrimination in medical training and practice, and campaign finance reform. *Id.*

[3] *See Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 390 n.3 (4th Cir. 2001); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir.1997); *New Hampshire Right to Life v. Gardner*, 99 F.3d 8, 18 (1st Cir.1996); *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).

because the district court dismissed the case on the basis that *McConnell* precludes all future as-applied challenges to the electioneering communication prohibition. WRTL asks the Court to reverse the district court on the first issue.

WRTL cannot pursue the second question unless this Court reverses the district court on the preclusion issue. If this Court reverses the district court, WRTL requests the Court to either rule on the merits or remand the case to the district court to expeditiously rule on the already filed and fully briefed cross-motions for summary judgment. This Court should do this expeditiously, as Congress specified at BCRA § 403, and in advance of the 2006 election season.

I. *McConnell* Neither Considered Nor Barred As-Applied Challenges.

The members of this Court can, of course, readily do what the district court could not—definitively determine what this Court meant by various statements in *McConnell*. But as shall be shown, the language and logic of the *McConnell* opinion indicate that it did not sub silentio establish a major change in the law to preclude all future as-applied challenges to the electioneering communication prohibition. And other considerations would prevent it.

A. *Broadrick* and Article III Require As-Applied Challenges.

In upholding the electioneering communication provision against a facial challenge, *McConnell* cited *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for the proposition that facial overbreadth must be substantial.[4]

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[4] *McConnell* concluded its overbreadth analysis as follows:

> We are therefore not persuaded that *plaintiffs have carried their heavy burden* of proving that [the prohibition] is overbroad. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Even if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not "justify prohibiting all enforcement" of the law unless its application to protected speech is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003). Far from establishing that BCRA's *application to pure issue ads* is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion. [*McConnell*, 540 U.S. at 207 (emphasis added).]

Broadrick recognized (as did *McConnell* by relying on it) that, where a facial challenge fails, any overbreadth is dealt with in as-applied challenges: "[The challenged act] is not substantially overbroad and . . . whatever overbreadth may exist should be cured through *case-by-case analysis* of the fact situations to which its sanctions, assertedly, *may not be applied*." *Broadrick*. 413 U.S. at 615-16 (emphasis added). So future as-applied challenges were recognized in *McConnell* and must be permitted.

This is also supported by Article III of the U.S. Constitution, which prevents federal courts from deciding cases not before them. *See, e.g.*, Charles Alan Wright, *Law of Federal Courts* at 54-59 (1983). So *McConnell* could not have decided the present as-applied challenge. It was not before the Court.[5] And based on reason and real-life experience, how could any court, in a facial challenge, foresee and decide all possible future factual situations that might arise so as to foreclose all future as-applied cases?

B. *McConnell* Expressly Eschewed Such Overbroad Reading of Precedent.

Based on Article III and prudential principles, this Court has created the avoidance principles summarized by Justice Brandeis in *Ashwander v. Tennessee Valley Author-*

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[5] This Court does sometimes declare matters nonjusticiable. That is not at issue here, and the Court clearly articulates when matters are nonjusticiable. *Compare Davis v. Bandemer*, 478 U.S. 109 (1986) (partisan gerrymandering claims held justiciable) *with Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality declared them nonjusticiable).

ity, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The second Article III-based principle is that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" nor will it "decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Id.* at 346-47 (citation omitted). The first prudential principle is that "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Id.* at 347 (citation omitted). Under these principles, this Court in *McConnell* could not have decided the present as-applied question in its *Broadrick*-based analysis.

McConnell expressly rejected any analysis going beyond the "precise facts" before the Court. While all courts considering the issue had decided that *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), created a constitutionally-mandated express advocacy test, *McConnell* declared the test a result of statutory construction and said that such overbroad reading of precedent violated a fundamental jurisprudential tenet.[6] It would be highly incongruous if *Buckley* and *MCFL* could not be read as establishing a constitutionally-required express advocacy test but the less-clear language of *McConnell* must be read to have decided

[6]The *McConnell* majority said that precedent must be read narrowly:

> We have long "rigidly adhered" to the tenet "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *United States* v. *Raines*, 362 U.S. 17, 21 (1960) (citation omitted), for "[t]he nature of judicial review constrains us to consider the case that is actually before us," *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., dissenting). Consistent with that principle, our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech. [*McConnell*, 540 U.S. at 192-93.]

all future cases whose "precise facts" were not before the Court. These fundamental tenets forbid it.

C. The FEC Argued in *McConnell* that As-Applied Challenges Should Be Brought Later, and *McConnell*'s Overbreadth Analysis Mandates It.

McConnell was litigated and decided as a facial challenge. *See, e.g.*, 540 U.S. at 203-07. In the district court, the FEC argued that no as-applied situations could possibly be considered, but must be left for later.[7] The FEC conceded overbreadth of up to six percent, but argued that later as-applied challenges were the solution for such overbreadth.[8]

[7]In the district court the FEC argued for later as-applied challenges:

> [N]one of these plaintiffs . . . has described particular advertisements, referring to clearly identified candidates for federal office, that they plan to run in proximity to one or more federal elections, to which they contend BCRA's application would be unconstitutional. Accordingly, to prevail, the Title II plaintiffs must establish that BCRA's regulation of electioneering communications "could never be applied in a valid manner," or is "substantially overbroad." *New York State Club Ass'n*[*v. City of New York*], 487 U.S. [1,] 11 [(1988)]; [*City of Los Angeles v.*] *Taxpayers for Vincent*, 466 U.S. [789,] 796-798 [(1984)]. [Redacted Brief of Defendants at 131, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-0582).]

[8]The FEC argued for later as-applied challenges as follows:

> the definition's overbreadth is no more than two to six percent—a far cry from the substantial overbreadth necessary to invalidate a statute on its face. Even if a few genuine issue ads will be subject to BCRA's regulation of electioneering communications, the Court "cannot conclude that [BCRA] is substantially overbroad and must assume that 'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may be applied.'" *New York State Club Ass'n*, 487 U.S. at 14 (quoting *Broadrick*, 413 U.S. at 615-56). [Redacted Brief of Defendants at 161, *McConnell*, 251 F. Supp. 2d 176.]

In this Court, the FEC argued the same.[9] Intervenors Senators McCain and Feingold and other prime BCRA sponsors also argued for leaving as-applied challenges until later.[10] The FEC tries to have it both ways by now arguing that as-applied challenges are precluded.

McConnell merely followed defendants' proposal to leave as-applied challenges as the solution for sorting out communications such as grass-roots lobbying, a solution likely also compelled by the press of time on this Court. Consequently, the Court brushed aside concerns about "genuine issue ads" and focused solely on "sham issue ads," calling them the "functional equivalent" of express advocacy. *Id.* at 206.[11]

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[9]"To the extent that the definition is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis, where a court would at least have the benefit of adjudicating the applicability of Title II to a concrete controversy." Brief for the FEC (Final Version) at 105-06, *McConnell*, 540 U.S. 93 (02-1674) (emphasis in original).

[10]BCRA's primary sponsors argued for later as-applied challenges:

> Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law. . . . These corporat[ions] . . . are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course. [[Redacted] Brief for Intervenors at 64, *McConnell*, 540 U.S. 93 (No. 02-1674).]

[11]That "sham issue ads" were the primary focus of *McConnell* is evidenced by a section entitled "Issue Advertising" in which this Court repeatedly refers to the ads as "so-called issue ads," 540 U.S. at 126-39, followed by a section entitled "Senate Committee Investigation" wherein the Court focused on the problem of "sham issue ads." *Id.* at 129-32. No section discussed authentic grass-roots lobbying. Comparing the frequency of pejorative terms for issue ads to discussion of genuine issue ads confirms the point. *Compare id.* at 126 ("so-called issue ads" twice), 128 (same twice), 129 ("bogus issue advertising"), 131 ("issue advertising designed to influence federal elections"; "sham issue advocacy"), 170 ("bogus issue advertising"), 185 ("sham issue ads"; "sham issue advertising"), 193 ("so-called issue advocacy"), 205 (same twice) *with id.* at 193 ("true issue ad"), 206 & n. 88 ("genuine issue ads" twice).

That this Court left open the option of as-applied challenges is clear in how it treated the overbreadth challenge to the prohibition. After the *McConnell* majority decided there was a compelling interest, *id.* at 205, a common next step in strict scrutiny would be to decide if Congress had narrowly tailored the prohibition to the interest. The Court didn't use the term "narrow tailoring," instead saying that "plaintiffs . . . challenge the [electioneering communications ban] on the ground that it is . . . overbroad," *id.* at 204, because "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." *Id.* at 206.

But BCRA's plaintiffs did not just allege that the ban was "overbroad." They insisted that the electioneering communication prohibition was not narrowly tailored to a compelling governmental interest, using strict scrutiny terminology.[12]

Plaintiffs often complain that a statute is "overbroad" when they mean that it is not narrowly tailored to effectuate only its compelling interest.[13] In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), this Court did the same when it was conducting a narrow

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[12]The "Business Plaintiffs" titled a section "The Electioneering Communication Standard Is Not Narrowly Tailored." Opening Brief of the "Business Plaintiffs" Chamber of Commerce et al. at 36, *McConnell*, 540 U.S. 93 (No. 02-1755). The AFL-CIO had a section captioned "The Primary Definition Is Not Narrowly Tailored." Brief of AFL-CIO Appellants/Cross-Appellees at 16, *McConnell*, 540 U.S. 93 (No. 02-1755).

[13]*Cf.*, Brief for Appellants/Cross-Appellees Sen. Mitch McConnell et al. at 50, *McConnell*, 540 U.S. 93 (No. 02-1674) ("[T]he 'electioneering communications' provisions are so overbroad that they cannot be sustained under any theory consistent with the First Amendment.").

tailoring analysis under strict scrutiny and spoke at one point of its analysis in overbreadth terminology. *Id.* at 655, 657, 660-61. But using "overbroad" to mean "not narrowly tailored" can be confusing because in First Amendment jurisprudence there is also the "substantial overbreadth" doctrine, which has to do with facial challenges and permits what is sometimes perceived as a form of third party standing. *See, e.g., Broadrick*, 413 U.S. 601.[14]

The *government* must prove that its restriction on free expression is narrowly tailored to a compelling governmental interest. *See, e.g., Austin*, 494 U.S. at 675. But the *plaintiff* must prove substantial overbreadth warranting facial invalidation. *Broadrick*, 413 U.S. at 613.

Often strict scrutiny establishes whether there are *any* applications of the ban that are unconstitutional before asking whether those applications are substantial.[15] BCRA's

[14]The narrow-tailoring version of "overbreadth" was described in *SUNY v. Fox*, 492 U.S. 469 (1989), where this Court said that "[t]he person invoking the . . . narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover." *Id.* at 482 (emphasis omitted). The facial-challenge variety of "overbreadth" arises when a defendant whose conduct may be regulated argues that, while his activity may be regulated, the applicable statute is an invalid rule that reaches substantial amounts of constitutionally-protected activity by non-parties. *Broadrick*, 413 U.S. at 612.

[15]That evaluating tailoring was a typical next step was demonstrated in *McConnell*. The Court employed formal narrow tailoring analysis when answering the argument that § 323(b) "is substantially overbroad because it federalizes activities that pose no conceivable risk of corrupting or appearing to corrupt federal officeholders," 540 U.S. at 166, and would be expected to do the same in answering the similar argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communication." *Id.* at 206.

prime sponsors argued things in this sequence.[16]

But *McConnell* said that the plaintiffs' challenge was about "overbreadth," declared that there was a compelling interest (the first step of strict scrutiny), then moved directly to a *Broadrick* "overbreadth" analysis that concluded "[w]e are therefore not persuaded that *plaintiffs* have carried their heavy burden of proving that [the prohibition] is overbroad." *Id.* at 207 (emphasis added). Since plaintiffs didn't bear the burden of proving narrow tailoring, the Court obviously declined to decide whether specific applications of the ban were narrowly tailored. The Court noted that the ban likely reached protected speech that Congress may not regulate (thereby implying that the tailoring was not narrow without appropriate exceptions), 540 U.S. at 206 n.88 ("we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"), but wanted to deal with such issues on an as-applied basis, i.e., the Court did not believe the facial overbreadth was substantial.[17]

This Court began its *Broadrick* overbreadth analysis by

[16]They argued narrow tailoring in a section entitled "Title II Is Narrowly Tailored To Serve Compelling Public Interests," [Redacted] Brief for Intervenor-Defendants at 56, *McConnell*, 540 U.S. 93, then argued that "Facial Invalidation Of Title II Would Be Especially Inappropriate," *id.* at 62, and "Plaintiffs Have Not Demonstrated Substantial Overbreadth." *Id.* at 64. The FEC followed the same sequence. Brief for the FEC, Et Al. at 90, 103, *McConnell*, 540 U.S. 93.

[17]The *McConnell* record evidence in the district court was that between 7% and 64% of the communications during the applicable period before the 1998 elections were not "sham" at all, i.e., that the regulation of as little as 36% of the ads encompassed by BCRA was supported by the interests proffered by the government. *McConnell*, 251 F. Supp. 2d at 309-10 (Henderson, J.). In *Mills v. Alabama*, 384 U.S. 214 (1966), the Court struck down a ban on speech that affected only one day, i.e., only .27% of a year. The FEC conceded as high as 6% overbreadth in the District Court. Redacted Brief of Defendants at 161, *McConnell*, 251 F. Supp. 2d 176.

declaring that plaintiffs' lack-of-justification argument "fails *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* at 206 (emphasis added). This was only demonstrated as to what the Court called "sham issue ads"[18] and not as to such other public communications as grass-roots lobbying. Because WRTL's ads asking listeners

[18]*McConnell* clearly identified what the Court meant by that term, beginning with a section entitled "Issue Advertising." 540 U.S. at 126. First, the Court noted that such ads "could be aired without disclosing the identity of, or any other information about, their sponsors." *Id.* In fact, the Court noted, "sponsors of such ads often used misleading names to conceal their identity." *Id.* at 128 (providing examples). *See also id.* at 196-97 (Title II analysis: "concealing their identities," "dubious and misleading names").

Second, the Court noted that "sham issue ads" closely resembled express advocacy ads. Both such ads and express advocacy ads "were used to advocate the election or defeat of clearly identified federal candidates," *id.*, and *McConnell* provided an immediate example of what it meant by that: "Little difference existed, for example, between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *Id.* at 126-27. In its discussion of BCRA Title II, the Court returned to this aspect of "sham issue ads" with this example:

> One striking example is an ad that a group called "Citizens for Reform" sponsored during the 1996 Montana congressional race, in which Bill Yellowtail was a candidate. The ad stated:
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> > "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." 5 1998 Senate Report 6305 (minority views).
>
> The notion that this advertisement was designed purely to discuss the issue of family values strains credulity. [540 U.S. at 193 n.78.]

No such sham ads are at issue on these facts.

to call a legislator, who happened to be a candidate, and ask him to vote a certain way on pending legislative action were not "sham issue ads" and were never of a type proven to be the "functional equivalent" of express advocacy, banning such an ad is unsupported by any governmental interest.

McConnell acknowledged the evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," insisting that "the vast majority of ads clearly had such a purpose." *Id.* "Vast majority" is the language of a "substantial" overbreadth analysis, and the Court's statement acknowledges that *some* issue ads may not constitutionally be regulated but that under a facial challenge the ban must be upheld because the overbreadth was not "substantial." The necessary implication is that those other issue ads must be the subject of as-applied challenges.[19]

D. *McConnell*'s Language Presupposed As-Applied Challenges.

McConnell also plainly indicated that the usual as-

[19]There was one facially challenged provision that received as-applied analysis in *McConnell*, indicating that as-applied challenges are appropriate and that *McConnell* decided the first. It had to do with whether the electioneering communication "prohibition," 540 U.S. at 203, applied to *MCFL*-type nonprofit corporations. *Id.* at 209-11. BCRA granted an exemption in one provision and took it away in another. *Id.* at 209 n.90. The Court said, "That [BCRA] does not, on its face, exempt *MCFL* organizations from its prohibition is not a sufficient reason to invalidate the entire section." *Id.* at 211. It noted that "the Government itself concedes that § 316(c)(6) does not apply to *MCFL* organizations" and recognized an as-applied exception for such corporations, presuming that Congress knew such an exception was required. *Id.* at 211. This shows that when the Court in *McConnell* wanted to deal with as-applied matters it did so clearly with clear terminology. *Id.* at 209-11 ("except insofar as it applied," "objection to applying," "does not on its face exempt," "could not validly apply to *MCFL*-type entities," "does not apply to *MCFL* organizations," "could apply," "as so limited"). There was no such discussion of grass-roots lobbying.

applied challenges must be permitted. This Court first suggested that one way to eliminate the chill on "genuine issue ads" in "doubtful cases" was to sidestep the definition of the prohibition or use PAC funds. 540 U.S. at 206. But WRTL's proposed ads are not properly in the "doubtful" category,[20] and the Court nowhere indicated that those were the only options. Another option was indicated in footnote 88: "[t]he interests that justify the regulation of campaign speech *might not apply* to the regulation of genuine issue ads." *Id.* (emphasis added). If "the interests . . . might not apply," then a case-by-case challenge is the approved mechanism for sorting out when a restriction on genuine issue ads is not narrowly tailored to a compelling governmental interest. *See infra* at 26-27 (re *McConnell* note 88).

As already noted, *McConnell* employed *Broadrick* overbreadth analysis, holding that "[f]ar from establishing that BCRA's application to pure issue ads is substantial,

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[20]The sort of grass-roots lobbying ads proposed here would not fall into the category of "doubtful" because they in no way promote, support, attack, or oppose a candidate. There are conceptually three types of "genuine issue ads":

1. genuine issue ads that omit reference to a federal candidate, and thus present no problem under the electioneering communication provision.

2. genuine issue ads that include a reference but also present no problem—for example, because they contain no words that could conceivably be construed to involve "promoting, supporting, attacking, or opposing a federal candidate."

3. genuine issue ads that include such a reference but raise some question of how they might be read: i.e., those making up the "doubtful cases." In this last case, laboring under this doubt, the organization might pay for the ad with a PAC. [Robert F. Bauer, *Wisconsin Right to Life in the Supreme Court: The Prospects for Salvaging "As Applied" Challenges to BCRA*, http://moresoftmoney hardlaw.com/articles/20040913.cfm (*More Soft Money Hard Law* Web Updates) (visited Feb. 16, 2005).]

The "doubtful" category is third in this list, but WRTL's ads fall into the second category.

. . . the record strongly supports the contrary conclusion." *Id.* at 207. This indicates that the ban reaches speech that Congress may not regulate, i.e., the tailoring was not narrow, but the Court wanted to deal with such issues on an as-applied basis.

And as noted, when the Court declared that plaintiffs' lack-of-justification argument "fails *to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," *id.* at 206 (emphasis added), this functional equivalence was demonstrated concerning "sham issue ads," not such other public communications as grass-roots lobbying. So the "extent" question remains open. The Court acknowledged that there was an evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," insisting that "the vast majority of ads clearly had such a purpose." *Id.* at 206. This acknowledges that there are *some* genuine issue ads that may not constitutionally be regulated by Congress, but that under a facial challenge the ban must be upheld because the overbreadth had not been proven to be "substantial." The necessary implication is that those other genuine issue ads must be the subject of as-applied challenges.

E. *McConnell*'s "In the Future" Comment Addressed Substantiality, Not Preclusion.

McConnell's statement that "in the future corporations . . . may finance genuine issue ads . . . by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund," *id.* at 206, must be understood in light of the immediately following reference to *Broadrick* and the conclusion that the alleged overbreadth was not "substantial." *Id.* at 207 (quoting *Broadrick*). In light of that conclusion about substantiality, the immediately preceding discussion had to be addressing substantiality.

Practically, this Court needed quickly to decide whether to sustain the electioneering communication prohibition because elections were rapidly approaching. The *McConnell* district court labored arduously through a voluminous record to establish what percent of genuine issue ads, as opposed to true electioneering speech, would be captured by the electioneering communication prohibition. Judge Leon had found that up to 17% of genuine issue ads, including authentic grass-roots lobbying as presented herein, were swept in by the prohibition. *McConnell*, 251 F. Supp. 2d. at 798-99. The *McConnell* plaintiffs' argument was that 17% was "substantial" so the prohibition must be facially struck down under *Broadrick*.

The *McConnell* district court had a heavy burden in dealing with the enormous record and briefing under a mandated expedited schedule. It took months to sift the mountains of evidence and draft three very different, lengthy opinions and findings and a two-judge memorandum opinion, which activity this Court summarized by noting that eleven cases had been "filed promptly after the statute went into effect in March 2002," that the district court opinion did not issue until "May 1, 2003," and that it "held some parts of BCRA unconstitutional and upheld others." 540 U.S. at 132-33.

This Court noted probable jurisdiction on June 5, 2003, *id.* at 133, and needed to have a decision in place by December 2003 because affected primaries were beginning in early 2004. The Court managed blinding speed under the circumstances, expediting briefing and issuing its decision on December 10, 2003. But the Court simply did not have time to wade through all the evidence to resolve the different findings of fact as to what constituted a "genuine issue ad" and what percentage of genuine issue ads were being swept in by the electioneering communications prohibition. So it relied on *Broadrick* substantial overbreadth analysis, which did not require resolution of the constitutionality of various applications of the prohibition.

Consequently, this Court's comments about "genuine issue ads" "in the future" were necessarily downplaying the substantiality of the 17% figure by (1) noting that "[t]he precise percentage of issue ads" was debated by the parties and the district court judges, (2) declaring that "the vast majority of ads clearly had [an electioneering] purpose," and (3) declaring that "in the future" there would be ways to minimize the percentage of genuine issue ads that were impacted. *Id.* at 206. In fact, the language of the "in the future" sentence appears to have been adapted from a section of the *FEC*'s Supreme Court Brief where the FEC argued that the overbreadth was not substantial enough for facial invalidation.[21]

And immediately after that statement, the Court added footnote 88, acknowledging that the justifications supporting the prohibition against constitutional attack "might not apply to genuine issue ads." The Court then concluded with the language citing *Broadrick*, quoted *supra* at note 4, and stated that "BCRA's application to pure issue ads is [not] substantial." *Id.* at 207. Understanding *Broadrick* facial analysis by its own express terms, this comment about "application to pure issue ads" not being substantial means that the electioneering communication prohibition is upheld against a *facial* challenge and there may be subsequent challenges under *as-applied* facts. *Broadrick*, 413 U.S. at 615-16 (insubstantial "overbreadth" is dealt with "through case-by-case analysis of the fact situations"). *McConnell* did

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[21]The FEC argued that

> The only basis for invalidating the statute on its face for overbreadth would be to conclude that in a substantial number of instances, organizations that seek to air legitimate issue advertisements would be unable to do so without triggering BCRA's definition .... To avoid BCRA, an organization need only refrain from identifying a federal candidate in an issue advertisement or avoid the narrow window before the candidate's election or advertising in the candidate's district. Moreover, . . . the separate segregated fund imposes only minimal . . . burdens .... [Brief for the FEC at 106, *McConnell*, 540 U.S. 93.]

not purport to alter the *Broadrick* facial challenge analysis, but rather relied upon it and so reaffirmed it.

F. *McConnell*'s Footnote 73 Had Nothing to Do With As-Applied Challenges.

The district court relied on *McConnell* footnote 73 for the proposition that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us." App. at 2a. Footnote 73 noted that there were two definitions of "electioneering communication" in BCRA—the primary one that this Court upheld and a backup definition—but that it did not need to reach the backup definition because "we uphold all applications of the primary definition and accordingly have no occasion to discuss the backup definition." 540 U.S. at 190 n.73. The district court misunderstood "all applications" to mean all applications of *the prohibition* of corporate funding of electioneering communications.

But footnote 73's mention of "all applications" had nothing to do with facial versus as-applied challenges. This Court was considering the *definition* of electioneering communication, which had a primary and a backup option. Whichever definition was settled upon (if either) would have various *applications in the statute*, i.e., to disclosure requirements for different entities and in different situations, 2 U.S.C. § 434(f), to disclaimer requirements, 2 U.S.C. § 441d, and to the prohibition on the use of corporate or labor union funds. 2 U.S.C. § 441b. The primary definition was upheld in all *these* "applications."

G. Justice Breyer's Title V Comment for the Court Supports As-Applied Challenges.

As to various *factual* applications in a *facial* substantial overbreadth analysis, this Court would have either upheld BCRA as to *all* applications (subject to later as-applied challenges) or as to none, based on whether the *Broadrick* overbreadth was deemed "substantial." This is what the Court did. 540 U.S. at 207. This would explain what Justice

Breyer was referring to in his discussion for the Court of BCRA's Title V (not Title II) when he parenthetically described the Court's facial upholding of the electioneering communication prohibition as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey message of support or opposition)." *Id.* at 239 (emphasis in original). This comment thus provides no support for an argument against as-applied challenges.

In fact, it expressly does the opposite. By likening *McConnell*'s decision on BCRA § 203 (electioneering communication prohibition) to BCRA § 504 (broadcaster reports), the Court indicated that as-applied challenges remained open because it explicitly said so in responding to Chief Justice Rehnquist's criticism that the Court's opinion on BCRA § 504 ignored the First Amendment rights of candidates and other speakers. 540 U.S. at 243-44. The majority responded that those rights were taken into account by the possibility of as-applied challenges:

> Moreover, candidates (or other speakers) whom § 504 affects adversely in this way (or in other ways) remain free to challenge the lawfulness of FCC implementing regulations and to challenge the constitutionality of § 504 as applied. To find that the speech-related interests of candidates and others may be vindicated in an as-applied challenge is not to "ignor[e]" those interests.

Id. at 244. Based on this assertion, *McConnell* didn't ignore interests in grass-roots lobbying because they may be vindicated in as-applied challenges.

In sum, this Court in *McConnell* did not foreclose as-applied challenges to the prohibition on corporate expenditures for electioneering communications. Nor may all future as-applied challenges be precluded. As noted in the Introduction, *supra*, reason and experience teach that no court can foresee all possible future fact situations that might arise and require the considered constitutional analysis of the federal courts. Precluding all future as-applied chal-

lenges on the basis of wording in the opinion in a facial challenge is unprecedented and without authority.[22]

II. An Exception for Genuine Grass-Roots Lobbying Is Constitutionally Required.

Authentic grass-roots lobbying is inherent in our constitutional system of *representative* government and is so essential to the people's self government that it requires an exception. It is supported by free expression and association rights, considered in *McConnell*, and also by the First Amendment right to petition.

WRTL seeks relief as to (a) its three broadcast ads *and/or* (b) grass-roots lobbying generally, as carefully defined, and, as to either of these options, it seeks to use either general funds or funds contributed to a segregated

[22]The district court also relied on an argument from silence, i.e., the fact that this Court did not expressly grant "permission" for an as-applied challenge. App. at 7a-8a, But federal courts never need permission to consider an as-applied challenge. *See Marbury v. Madison*, 1 Cranch 137 (1803) (power of judicial review). Key cases in the election-law context were as-applied challenges to federal laws that were decided under the federal courts' inherent authority of judicial review without prior judicial permission. *Compare Buckley*, 424 U.S. 1, *with MCFL*, 479 U.S. 238 (1986), *Austin*, 494 U.S. 652, and *McConnell*, 540 U.S. at 206.

Congress itself acknowledged that the electioneering communication prohibition might not be narrowly tailored by authorizing the FEC to create additional exceptions to the electioneering communication definition, with the limitation that communications not promote, support, attack, or oppose a candidate. 2 U.S.C. § 434(f)(3)(B)(iv). Grass-roots lobbying was one of the candidates for an exclusion that the FEC considered, although it decided (erroneously) that it could not create one because "the Commission believe[d] that such communications could be reasonably perceived to promote, support, attack or oppose a candidate in some manner." 67 F. Reg. 652003. As discussed below, the prime sponsors of BCRA argued that the FEC should create a grass-roots lobbying exception under this authority. *Infra* at 27-28. It would be incongruous for a federal agency to have the power to consider exceptions in a rulemaking but for an Article III court not to have that power in a constitutional challenge.

bank account that includes donations from only individuals qualified under 2 U.S.C. § 434(f)(2)(E), *see* App. 19a, i.e., no donations from corporations, labor unions, or foreign nationals.[23] *See* Amended Complaint Count 2. This Court should go beyond the three broadcast ads, derive the constitutional principle, and state a bright-line rule recognizing an exception to the prohibition on corporate electioneering communications for authentic grass-roots lobbying.[24]

McConnell said that the "constitutionally adequate justification" for upholding the electioneering communication prohibition was that the "sham issue ads" considered were the "functional equivalent of express advocacy." 540 U.S. at 206. So the issue here is whether grass-roots lobbying ads equate to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44.

Throughout the *McConnell* litigation, authentic grass-roots lobbying was perceived as different in kind from electioneering. Judge Leon, the controlling vote in the district court, clearly thought that grass-roots lobbying must be excluded from the "sham issue ads" category. He found that grass-roots lobbying did not support or oppose candidates, declaring that his approach to the electioneering communication definition

> assures that there will be no real, let alone substantial, deterrent effect on political discourse *unrelated* to federal elections. Genuine issue advocacy thereby remains exempt from both the backup definition and its attendant disclosure requirements and source restrictions. Similarly, genuine issue advocacy, specifically of

[23]Under either approach, the FEC could promulgate regulations before another major election.

[24]This would adhere to the example of *MCFL*, which set out the three factors that were essential to the Court's decision, thus distilling the constitutional principle to a bright-line rule guiding corporations in the future. *MCFL*, 479 U.S. at 263-64.

the legislation-centered type, that mentions a federal candidate's name in the context of urging viewers to inform their representatives or senators how to vote on an upcoming bill will not be regulated by the backup definition because it does not promote, support, attack, or oppose the election of that candidate. *See* Findings 368-73 (providing examples of legislation-centered advertisements that do not promote, support, attack, or oppose the election of a federal candidate). [*McConnell*, 251 F. Supp. 2d at 802-03 (Opinion of Judge Leon) (emphasis in original).][25]

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[25]Judge Leon singled out grass-roots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

> The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs' witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate's name in these advertisements in order to focus the public's attention on a particular pending piece of legislation. For example, Paul Huard of NAM states "[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors' names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*" Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is ... especially effective by showing them how they can personally impact the issue debate in question." Mitchell Decl. ¶ 11; *see also* Finding 293. [*McConnell*, 251 F. Supp. 2d at 794 (emphasis in original).]

Up to 17% of the ads for which the *McConnell* district court did fact finding were "genuine issue ads" (in which Judge Leon included grass-roots lobbying), with possibly more genuine ads in years with more hot-button legislative issues. *Id.* at 798-99.

The *McConnell* majority in this Court made the same distinction between grass-roots lobbying and ads that were the functional equivalent of express advocacy in footnote 88. The note refers to Justice Kennedy's dissent, 540 U.S. at 326-27, where he cited Justice Stevens' *Austin* concurrence, in which Justice Stevens said "there is a vast difference between *lobbying* and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678 (emphasis added). Justice Kennedy responded that "[t]he distinction, however, between independent expenditures for commenting on issues, on the one hand, and supporting or opposing a candidate, on the other hand, has no significance apart from *Austin*'s arbitrary line." 540 U.S. at 326. Justice Kennedy then asserted that *Austin* was in error, essentially arguing that there is no constitutional line to be drawn between electioneering and genuine issue advocacy. *Id.* at 327. According to Justice Kennedy, corporations and unions should be able to do both without governmental restrictions.

Justice Stevens believed there *was* a principled distinction between "lobbying" and electioneering. *Austin*, 494 U.S. at 678. That debate apparently was what footnote 88 was about. Justices Stevens and O'Connor for the *McConnell* Court insisted that government may regulate electioneering but not lobbying, and Justice Kennedy insisted that government may not prohibit corporations from doing either. Justice Stevens' view prevailed, meaning that *McConnell* held that the government may regulate electioneering but not what footnote 88 called "genuine issue ads."

In the statement of the case, WRTL set out 16 factors that demonstrate that its broadcast ads were authentic grass-roots lobbying, as distinct from "sham" ads. But WRTL also provides a careful definition for the proposed grass-roots lobbying exception that adapts a proposal by Sen. McCain, Sen. Feingold, and the other prime sponsors of BCRA for a grass-roots lobbying exception:

> The term "electioneering communication" does not include any communication that:
>
> (x)(A) Meets all of the following criteria: (i) the communication concerns only a [specific, pending] legislative or executive branch matter; (ii) the communication's only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; and (iii) the communication contains no reference to any political party.
>
> (B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate's record or position on any issue; (ii) the candidate's character, qualifications or fitness for office; or (iii) the candidate's election or candidacy. [The criteria in Paragraph (A) are also not met as to a legislative matter if the legislature is not in session.][26]

The definition of Senators McCain and Feingold would have permitted a candidate to be clearly identified (by reference to "your Senator" or "your Congressman"), but not named. However, naming the candidate is necessary, as Judge Leon noted from the *McConnell* record, *supra* at note

[26]The formulation is contained in Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC, Aug. 23, 2002 (hereinafter "McCain-Feingold Comments") (it is on the FEC's website at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf (visited July 26, 2004) along with other comments on the proposed rulemaking for a grass-roots lobbying exception) (bracketed material added).

25, and is easily justifiable based on the people's exercise of their sovereignty in a republic and their right to petition, which includes grass-roots lobbying.

Either the broadcast communications proposed on the facts of this case or the carefully-defined distillation of them into the proposed bright-line rule just set out eliminates the constitutional concerns recognized by this Court as justifying the prohibition. The option of using only funds from a "separate bank account" to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E), would eliminate even more concerns, if necessary. Because WRTL does not challenge the disclaimer and disclosure provisions, there will be no question as to the source and funding of WRTL's ads. There will be no ads resembling express advocacy or the "sham ads" that the Court found to be "functional equivalents." The ads that would be permitted under this definition would be of little or no value for the purposes of opposing/supporting candidates, but they are essential to self government.

What would be excluded by these facts and definition? There could be no ads naming candidates that were not incumbents. There could be no ads about a candidate's past votes, or general voting pattern, or possible vote on legislation that might later be introduced. There could be no ads about a candidate's perceived misconduct toward his wife or intern, or whether taxes were withheld and paid for a nanny decades ago. Candidates could not be branded liberal or right-wing, pro- or anti-gun, pro- or anti-abortion, pro- or anti-environment, pro- or anti-globalism, pro- or anti-education, pro- or anti-gay, or even Democrat, Republican, Libertarian, or independent. Nor could they be scrutinized as to the sufficiency or conduct of their military service. Elections and candidacy could not be mentioned.

This is the narrowly tailored, least restrictive means of eliminating the concerns identified in *McConnell*. Absent constitutional justification, the prohibition may not be applied on the facts of this case. This Court has already

decided that where constitutional justification is absent, the "desire for a bright-line rule" with regard to requiring PAC funding of communications

> hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom. While the *burden on MCFL's speech is not insurmountable*, we cannot permit it to be imposed *without a constitutionally adequate justification*. In so holding, we do not assume a legislative role, but fulfill our judicial duty—to enforce the demands of the Constitution. [*MCFL*, 479 U.S. at 263 (emphasis added).]

In any event, WRTL *has* provided a bright-line test for grass-roots lobbying, *infra*, that is every bit as bright as the exception for *MCFL*-type corporations created by the Supreme Court in *MCFL*. *Id.* at 263-64. The sort of "genuine issue ads" that constitute grass-roots lobbying can be neatly cabined without placing any burden on the courts or the FEC's ability to enforce regulations concerning activities that actually pose a risk to the public good.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction, reverse the district court, and decide the merits of the claim. Alternatively, the Court should summarily reverse the district court's dismissal and remand this case with instructions to expeditiously decide the already briefed cross-motions for summary judgment.

Respectfully submitted,

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[filed May 10, 2005]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC., Plaintiff,	)	Civil No. 04-1260 (DBS, RWR, RJL)
v.	)	THREE-JUDGE COURT
FEDERAL ELECTION COMMISSION, Defendant.	)	

ORDER

For the reasons set forth in this Court's Memorandum Opinion and Order dated May 9, 2005, it is this 9th day of May, 2005, hereby

ORDERED that the plaintiff's Motion for Summary Judgment [#41] is DENIED as moot; and it is further

ORDERED that the defendant's Motion for Summary Judgment [#43] is DENIED as moot; and it is further

ORDERED that the case is dismissed with prejudice.

SO ORDERED.

/s/ David B. Sentelle
DAVID B. SENTELLE
United States District Judge

/s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

[filed May 10, 2005]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC., Plaintiff,	)	Civil No. 04-1260 (DBS, RWR, RJL)
v.	)	THREE-JUDGE COURT
FEDERAL ELECTION COMMISSION, Defendant.	)	

MEMORANDUM OPINION AND ORDER

In the present action, plaintiff Wisconsin Right to Life, Inc. ("WRTL") seeks a judgment declaring portions of the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), unconstitutional as applied to it under the facts set forth in its complaint. WRTL sought preliminary injunctive relief preventing the defendant, Federal Election Commission ("FEC"), from enforcing the contested portions of BCRA against it.

On August 17, 2004, the Court denied WRTL's motion for preliminary injunctive relief. In denying WRTL's motion, the Court held that "the reasoning of [the Supreme Court in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003)] leaves no room for the kind of 'as-applied' challenge to BCRA asserted by WRTL, even though the *McConnell* Court "was considering a facial challenge . . . ." Mem. Op. at 4. After denying WRTL's motion, the Court ordered the parties to submit supplemental memoranda addressing the issue of whether the case should be dismissed in light of the Court's ruling. The issue now ripe for review, and after due consideration of the parties' supplemental memoranda and the entire record herein, the Court for the reasons set forth

in its prior opinion holds that WRTL's "as-applied" challenge to BCRA is foreclosed by the Supreme Court's decision in *McConnell*. Accordingly, WRTL's case is dismissed with prejudice.

This the 9th day of May, 2005.

/s/ David B. Sentelle
DAVID B. SENTELLE
United States District Judge

/s/ Richard W. Roberts
RICHARD W. ROBERTS
United States District Judge

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

[file mark: August 17, 2004]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
Plaintiff,	)	Civil No. 04-1260 (DBS, RWR, RJL)
v.	)	THREE-JUDGE COURT
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter coming before the court on plaintiff's motion for a preliminary injunction, and the court having considered the affidavits and representations of counsel, solely for the purposes of the motion for a preliminary injunction, the court makes the following findings of fact:

1. Plaintiff Wisconsin Right to Life, Inc. (WRTL) is a nonprofit, nonstock, Wisconsin, ideological advocacy corporation recognized by the Internal Revenue Service as tax-exempt under § 501(c)(4) of the Internal Revenue Code.

2. Defendant Federal Election Commission (FEC) is the government agency charged with enforcing the relevant provisions fo the Federal Election Campaign Act, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA).

3. WRTL admits that it does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for the § 501(c)(4) organizations

as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A).

4. U.S. Senator Russell Feingold of Wisconsin is running for reelection this year.

5. As early as September, 2003, candidates opposing Senator Feingold made Senator Feingold's support of Senate filibusters against judicial nominees a campaign issue. Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. (Def.'s Opp'n) Exh. 10-14.

6. WRTL maintains a political action committee (PAC).

7. In March, 2004, WRTL's PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority. Def.'s Opp'n Ex. 4, 5, 6, 7.

8. In a news release on July 14, 2004, WRTL criticized Senator Feingold's record on Senate filibusters against judicial nominees. Def.'s Opp'n Exh. 16.

9. WRTL had used a variety of non-broadcast communications to convey its criticism of Senate filibusters against judicial nominees in the months leading up to August 2004.

10. WRTL is now paying to broadcast on television and radio a series of advertisements inclusive of those depicted in Exhibits A, B, and C to the complaint and attached as Exhibits A, B, and C hereto, all of which refer to and will continue to refer to and clearly identify Senator Russell Feingold.

11. The Wisconsin primary for the office for which Senator Feingold is a candidate will occur thirty days after August 15, 2004. The general election will occur November 2, 2004.

12. WRTL anticipates that its ongoing advertisements will be considered electioneering communication for purposes of federal statutory and regulatory definitions under 1 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29 during the period between August 15, 2004 and November 2, 2004.

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff Wisconsin Right to Life seeks a judgment declaring portions of the BCRA unconstitutional as applied to it under the facts set forth in its complaint, and it seeks preliminary injunctive relief preventing FEC enforcement of those portions of BCRA against it.

The focus of the litigation is 2 U.S.C. § 441b, which regulates the extent to which such corporations as WRTL may finance and produce "applicable electioneering communications," which are defined at 2 U.S.C. § 434(f)(3) as being "any broadcast, cable, or satellite communication which (I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general . . . election . . . ; or (bb) 30 days before a primary . . . election; and (III) . . . is targeted to the relevant electorate."

In this case, WRTL cites three specific ads, first aired July 26, which contain references to Sen. Russell Feingold, currently the sole Democrat contender for the Senate seat. Complaint 5. As the primary election occurs on September 14 and the general election occurs on November 2, BCRA's (in this case, overlapping) "blackout" periods prohibit the airing of the advertisements from August 15 until November 2. *Id.* at 6.

WRTL's prayer for relief is sweeping, seeking both declaratory and injunctive relief declaring 2 U.S.C. § 4441b unconstitutional as applied to "electioneering communications . . . that constitute grass-roots lobbying," and specifically as applied to the three advertisements incorporated in its complaint. Complaint 13. However, the motion before us today concerns only its motion for a preliminary injunction. The standards for the granting of a preliminary injunction are familiar. To prevail, a plaintiff seeking such relief must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable harm if an injunction is not granted; (3) that an injunction would not cause substantial injury to other parties; and (4) that the public interest would be furthered by the injunction. *See,*

e.g., CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). Plaintiff's showing in the present litigation cannot survive this standard.

First, WRTL has not established that it has a substantial likelihood of success on the merits. Just last year, in *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003), the Supreme Court upheld the electioneering communication provisions of the BCRA in their entirety. *Id.* at 686-700. WRTL is correct that in *McConnell* the Court was considering a facial challenge while the current challenge subjects the statute to constitutional analysis in the context of its specific application, but the reasoning of the *McConnell* Court leaves no room for the kind of "as applied" challenge WRTL propounds before us. More specifically, the Court noted that the statute included a "back up" definition of electioneering communications, 2 U.S.C. § 434(f)(3)(A)(I), to take effect only if the primary definition were held to be "constitutionally insufficient." The Court expressly stated that it need not rule on the constitutionality of that back up provision because "*we uphold all applications of the primary definition* and accordingly have no occasion to discuss the backup definition." 124 S. Ct. at 687 n.73 (emphasis added). The Court's deliberate declaration of its ruling as encompassing "*all applications* of the primary definition" suggests little likelihood of success for an "as applied" challenge to some applications of that definition, such as the one plaintiff brings before us.

Furthermore, the Court's deliberate upholding of "all applications" stands in informative contrast to its explicit acknowledgment that other parts of the statute which it upheld against facial challenge might be subject to "as applied" challenges in the future. For example, the Court upheld a Title I provision of BCRA restricting state parties from spending "soft money for federal election activities.: 2 U.S.C. § 441i(b). But the Court stated that "as-applied challenges remain available" if some future state party

could show that the restriction had become "'so radical in effect as to . . . drive the sound of [the recipient's] voice below the level of notice.'" *Id.* at 677 (brackets in the original) (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000)). Similarly, in upholding the ban on soft money fundraising by national party committees, 2 U.S.C. § 441i(a), the Court noted that "'a nascent or struggling minor party can bring an as-applied challenge" should the ban prevent it from "amassing the resources necessary for effective advocacy.'" *Id.* at 669 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)).

Again, in upholding the Title V recordkeeping requirement on broadcasters, the Court noted that the regulated entities "remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied." *Id.* at 717. And finally, the Court noted that its ruling upholding against facial challenge the § 201 disclosure provisions of Title II "does not foreclose possible future challenges to particular applications" of that statutory requirement. *Id.* at 692.

While these dicta concerning the possible future facial challenges to other provisions do not preclude the possibility that the Supreme Court might uphold an as-applied challenge to the provisions before us, in the face of the strength of the Court's holding with specific reference to these provisions, we cannot possibly conclude that the plaintiff has made out a substantial likelihood of success on the merits.

Our reading of *McConnell* that as-applied challenges to § 441b are foreclosed is but one reason we find little likelihood of success on the merits. The facts suggest that WRTL's advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating. *Id.* at 695. In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of

support or opposition" regarding candidates. *Id.* at 651, 697, 715. Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. (See Def.'s Opp. Exh. 4, 16, 18). This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement (Def.'s Opp. Exh. 10-14), and the PAC announcing as a priority "sending Feingold packing." (Def.'s Opp'n Exh. 4.)

As to the second part of the preliminary injunction standard, we hold that plaintiff has not demonstrated that it will suffer irreparable harm in the absence of a preliminary injunction. Plaintiff relies on the general statement that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Unquestionable, as a general proposition of law, that statement is true. However, in adjudicating entitlement of a plaintiff to a preliminary injunction, we must apply the whole four-part test, which requires us to determine whether the "balance of harms favor[s] plaintiffs." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1137 (D.C. Cir. 1988). That said, the actual limitation on plaintiff's freedom of expression, as protected by the First Amendment, is not nearly so great as plaintiff argues. At least for purposes of a preliminary injunction, the present showing appears to be that plaintiff is not precluded from forwarding its message, or even from exposing the public to the particular advertisements at issue. As we understand it, the BCRA does not prohibit the sort of speech plaintiff would undertake, but only requires that corporations and unions engaging in such speech must channel their spend-

ing through political action committees (PACs).[1] In *McConnell*, the Supreme Court noted that though "corporations . . . may not use their general treasury funds to finance electioneering communications, . . . they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id.* at 695. The Court went on to reason that "'the PAC option allows corporate political participation without the temptation to use corporate funds for political influence . . . .'" *Id.* (quoting *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200, 2211 (2003)).

The *Beaumont* decision quoted by the Supreme Court in *McConnell*, while not directly on point as it did not deal with the current statute, is instructive. That case involved a challenge to the regulation of a corporation's political contributions while the present involves regulation of electioneering communications. Nonetheless, the analogy is obvious. In *Beaumont*, the Supreme Court endorsed the constitutional adequacy of "the PAC option." That holding by the Supreme Court not only weighs against the likelihood of success on the merits, but it also suggests that plaintiff has not advanced a strong case of irreparable harm in the absence of a preliminary injunction. Certainly, it suggests that the harm established by plaintiff will not weigh much in the balance against potential harm to others under the third step of the test or against the public interest under the fourth. Therefore, WRTL has failed the second as well as the first step of the four-part test.

Given the absence of merit in plaintiff's case on the first element of the preliminary injunction test and the near-total absence of irreparable harm to the plaintiff under the second, we need not linger long over the third and fourth

---

[1]WRTL also has alternative methods available to communicate its message in addition to using PAC funding for broadcast ads, namely, using print media, such as newspaper of magazine advertisements, press releases, pamphlets, informational mailings, and billboards; using electronic communications, such as e-mailing and internet posting; and placing telephone calls.

elements. The harm to the opposing party, the Federal Election Commission, is evident. Everyone agrees that it is the statutory duty of the defendant to enforce the BCRA. If we enter the preliminary injunction, then, to the extent of that injunction, the Commission cannot perform its duty. We hold that an injunction against the performance of the its statutory duty constitutes substantial injury to the Commission, although given plaintiff's failure on the first two elements, we do not consider that showing essential to our denial of the preliminary injunction.

Similarly, since plaintiff has not established any entitlement to preliminary injunction, it is not essential that we determine that the grant of such an injunction would fail to further the public interest, but for the sake of completion of record for the purposes of any review that might be sought, we do hold that plaintiff has not established that the public interest would be furthered by the injunction. The Supreme Court has already determined that the provisions of the BCRA serve compelling government interests. *See McConnell*, 124 S. Ct. at 695-96. To the extent that the injunction of the proposed application of those provisions interferes with the execution of the statute upheld by the Supreme Court in *McConnell*, the public interest is already established by the Court's holding and by Congress's enactment, and the interference therewith is inherent in the injunction.

In short, plaintiff's case falls far short of the four-part test for the grant of a preliminary injunction. Therefore, we have denied plaintiff's motion. In light of this disposition, we further order that the parties hereto file supplemental memoranda within ten days of the date of this memorandum and order addressing the question of whether this matter should be dismissed.

This the 17th day of August, 2004.

/s/ David B. Sentelle
United States District Judge

/s/ Richard W. Roberts
United States District Judge

/s/ Richard J. Leon
United States District Judge

Radio Script
Client: Wisconsin Right to Life
Title: "Wedding" :60
Job#: WRL-8136
Date: July 15, 2004

AUDIO	TALENT
We hear church bells up and under...	PASTOR: And who gives this woman to be married to this man?
	BRIDE'S FATHER (rambling): Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up...
	VO:
	Sometimes it's just not fair to delay an important decision.
	But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates don't get a chance to serve. Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
	BRIDE'S FATHER (rambling): Then you get your joint compound and your joint tape and put the tape up over...
	Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
	Visit: BeFair.org. That's BeFair.org
	Paid for by Wisconsin Right to Life

(befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Exhibit

A

Radio Script
Client: Wisconsin Right to Life
Title: "Loan":60
Job#: WRL-8136
Date: July 14, 2004

AUDIO	TALENT
	LOAN OFFICER: Welcome Mr. and Mrs. Shulman. We've reviewed your loan application, along with your credit report, the appraisal on the house, the inspections, and, well...
	COUPLE: Yes, yes... we're listening.
	OFFICER: Well, it all reminds me of a time I went fishing with my father. We were on the Wolf River in Waupaca...
	VO: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple "yes" or "no" vote. So qualified candidates aren't getting a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency.
	Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
	Visit: BeFair.org
	Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

Exhibit
B

TV Script
Client: Wisconsin Right to Life
Title: "Waiting":30
Job#: WRL-8136
Date: July 14, 2004

VIDEO	AUDIO
We see vignettes of a middle-aged man being as productive as possible while his professional life is in limbo:	
He reads the morning paper He polishes his shoes He checks for mail, which hasn't arrived He scans through his Rolodex He reads his Palm Pilot manual He pays bills	VO: There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of U.S. Senators is filibustering—blocking qualified nominees from a simple "yes" or "no" vote . It's politics at work and it's causing gridlock.
SUPER: www.BeFair.org	Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
4-SECOND DISCLAIMER (4% or 20 scan lines): Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising, not authorized by any candidate or candidate's committee.	Visit: BeFair.org WRL REPRESENTATIVE VO: Wisconsin Right to Life is responsible for the content of this advertising.

Exhibit
C

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection—

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the

candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate

(consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 441b(a)-(b)(2)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution

prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and

solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

BCRA § 403(a) & (d), 116 Stat. at 113-14

SEC. 403. JUDICIAL REVIEW

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.—If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

* * *

(d) APPLICABILITY.—

(1) INITIAL CLAIMS.—With respect to any action initially filed on or before December 31, 2006, the provisions of subsection (a) shall apply with respect to

each action described in such section.

(2) SUBSEQUENT ACTIONS.—With respect to any action initially filed after December 31, 2006, the provision of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section—

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) Refers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, publicly distributed means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A special election or a runoff election is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) Targeted to the relevant electorate means the communication can be received by 50,000 or more persons—

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a

complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) Can be received by 50,000 or more persons means—

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an

FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour—

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a

broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that—

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) Electioneering communication does not include any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial

distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum;

(5) Is not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office; or

(6) Is paid for by any organization operating under section 501(c)(3) of the Internal Revenue Code of 1986. Nothing in this section shall be deemed to supersede the requirements of the Internal Revenue Code for securing or maintaining 501(c)(3) status.

11 C.F.R. § 114.2(a)-(b)

§ 114.2 Prohibitions on contributions and expenditures.

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local,

State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited form making expenditures as defined in 11 FR 114.1(a) for communications to those outside the restricted class expressly advocating the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(A) The committee is not a political committee as

defined in 11 CFR 100.5;

(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

11 C.F.R. § 114.14

§ 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply to funds disbursed by a corporation

or labor organization, or received by a person, that constitute --

(1) Salary, royalties, or other income earned from bona fide employment or other contractual arrangements, including pension or other retirement income;

(2) Interest earnings, stock or other dividends, or proceeds from the sale of the person's stocks or other investments; or

(3) Receipt of payments representing fair market value for goods provided or services rendered to a corporation or labor organization.

(d)(1) Persons who receive funds from a corporation or a labor organization that do not meet the exceptions of paragraph (c) of this section must be able to demonstrate through a reasonable accounting method that no such funds were used to pay any portion of an electioneering communication.

(2) Any person who wishes to pay for electioneering communications may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104. Use of funds exclusively from such an account to pay for an electioneering communications shall satisfy paragraph (d)(1) of this section. Persons who use funds exclusively from such a segregated bank account to pay for an electioneering communication shall be required to only report the names and addresses of those individuals who donated or otherwise provided an amount aggregating $ 1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

[filed: May 12, 2005]

United States District Court
District of Columbia

Wisconsin Right to Life, Inc. ***Plaintiff,***	
v.	**Civil No. 04-1260 (DBS, RWR, RJL)**
Federal Election Commission, ***Defendant.***	THREE-JUDGE COURT

Notice of Appeal of Dismissal to U.S. Supreme Court

Plaintiff Wisconsin Right to Life, Inc. ("WRTL") hereby gives notice that it appeals to the United States Supreme Court from this Court's *Memorandum Opinion and Order* (Docket #48, dated May 9, filed May 10, 2005) and *Order Dismissing Case With Prejudice* (Docket #49, dated May 9, filed May 10, 2005), which dismiss WRTL's complaint with prejudice.

Appeal is taken pursuant to 28 U.S.C. § 1253 (providing for direct appeal to the Supreme Court from decisions of three-judge courts denying a permanent injunction) and Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 114 (Public Law 107-155) (providing for direct appeal to the Supreme Court of the "final decision" of this District Court).

Respectfully submitted,

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